

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529

**Identifying data deleted to
prevent unwarranted
invasion of personal privacy**



U.S. Citizenship
and Immigration
Services

D7

DEC 07 2004

FILE: SRC 03 165 50285 OFFICE: TEXAS SERVICE CENTER Date:


IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Georgia and claims to be engaged in the import and distribution of medical instruments. The petitioner states that it is the subsidiary of Ultra Surgico, located in Pakistan. The beneficiary was previously granted a two-year extension of his L-1A visa, which was initially approved for a one-year period of stay in the United States in July 2000. The petitioner now seeks to extend the beneficiary's stay for an additional two years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary has been and would be employed in the United States in a managerial or executive capacity.

On appeal, counsel submits a brief challenging the director's analysis of the facts and citing a district court case in support of her legal arguments.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulations at 8 C.F.R. § 214.2(l)(3) state that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive, or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States.

At issue in this proceeding is whether the petitioner has established that the beneficiary has been and would be employed in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the petition, the petitioner stated that the beneficiary would be responsible for overseeing all business operations, including all personnel transactions, establishing and implementing company goals and policies, supervising management to expand sales, and communicating with the parent company.

On June 5, 2003, CIS issued a request for additional evidence instructing the petitioner to explain how the beneficiary meets the criteria for managerial or executive capacity, noting that with only two employees

working for the company, the beneficiary is likely to be consistently engaged in performing non-qualifying duties. The petitioner was also asked to submit several quarterly tax returns and to explain what duties its other employees perform, if in fact it has other employees.

The petitioner's response included the following description of the beneficiary's duties in the United States:

1. 10 Hours Direct and coordinate personnel engaged in marketing, sales and import/distribution functions through assignment of tasks and responsibilities to [the] vice president and office manager
2. 5 Hours Formulate administrative policies for short[-]term business practices based upon financial and sales data
3. 5 Hours Oversee development of goals and policies related to improving business operations and expending revenues as implemental [sic] by [the] Vice-President
4. 1 Hour Review budgets and costs and adjust accordingly
5. 5 Hours Analyze data and oversee preparation of reports to be submitted to management at our Pakistan manufacturing facility related to sales, quality control, scheduling, and customer services
6. 3 Hours Confer with the Vice-President to review department policies and discuss required changes
7. 2 Hours Allocate funds to support appropriate functions regarding importing/distributing quality control and purchasing operations
8. 5 Hours Plan, in coordination with Pakistan factory, production, and delivery schedules for customer orders, special requirements, etc.
9. 2 Hours Review production reports from Pakistan factory and resolve problems to ensure minimum costs, prevent operational delays, and revenues
10. 1 Hour Interface with product development division in Pakistan factor to produce new designs which can be manufactured in the most efficient manner

The petitioner also submitted its quarterly wage statements for the last two quarters of 2002, and for the first quarter of 2003. The petitioner attached unemployment reports for the last quarter of 2002 and the first quarter of 2003 listing the beneficiary and the import and distribution manager as the petitioner's only two employees. However, the petitioner's organizational chart and separate list of employees shows three additional employees including a vice president, a sales representative, and an office manager. The petitioner provided the names and brief job descriptions for each claimed employee. However, no documentation was provided as proof of their employment.

On June 27, 2003, the director denied the petition noting that at the time of filing the petition the petitioner had two employees. The director concluded that the beneficiary is not managing any professional or managerial employees and is likely to be directly involved in the petitioner's daily operational tasks.

On appeal, counsel states that the petitioner has more employees than what was determined by the director and asserts that the director's fact analysis is incorrect. Counsel claims further that the beneficiary is responsible for all "executive/managerial functions" and as such has discretionary authority over the entire organization. While counsel is clearly claiming that the beneficiary is eligible for status as an L-1A intracompany transferee, neither she nor the petitioner actually specify whether the beneficiary is and would be employed in a managerial or executive capacity. Rather, counsel uses both terms together, thereby failing to make the distinctions between the two. However, a petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one capacity or the other. Although the petitioner submitted a breakdown of the beneficiary's job duties, the record contains no clear indication as to the category under which those duties fall.

Counsel also urges the AAO to focus on the reasonable needs of the petitioning organization and claims that the petitioner employs a sufficient support staff, which consists of a vice-president, an import and distribution manager, an office manager, and an independent sales representative. While the petitioner has included these position titles in its list of employees and in its organizational chart, which were submitted in response to the request for evidence, the documentary evidence submitted shows only the employment of the beneficiary and the import and distribution manager. Of all the tax and state unemployment documentation, none contain the names of the vice president or office manager. And no documentation has been submitted to show that any commissions have been paid to the independent sales representative claimed in the list of employees. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel further refers to an unpublished decision involving an employee of the Irish Dairy Board. In the unpublished decision, the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the Irish Dairy Board matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Therefore, the several other unpublished cases cited by counsel need not be addressed as they carry no evidentiary weight in the instant matter.

While counsel also cited the published decision of *Omni Packaging Inc. v. INS*, 733 F.Supp. 500 (U.S. District Court, D. Puerto Rico 1990), this case is also not binding on the AAO's decision. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be

given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Another of counsel's arguments turns on CIS's approval of other petitions that had been previously filed on behalf of the beneficiary by the same petitioner. However, the director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). In the instant case, the petitioner submitted a lengthy breakdown of the beneficiary's duties in response to the request for evidence. However, a majority of the descriptions are entirely too vague and fail to convey an understanding of what the beneficiary has been and would be doing on a daily basis. For instance, there is no indication as to the data that the beneficiary would be analyzing, what methods of analysis he would use, and what is actually involved in overseeing the preparation of reports. Nor is there any indication as to the managerial nature of coordinating delivery schedules, another of the beneficiary's duties. Furthermore, the petitioner indicates that roughly 25% of the beneficiary's week will be spent managing personnel who perform the marketing and sales tasks. However, even if the AAO were to consider the petitioner's claimed list of employees without documentary proof of their employment, none of the duties listed for the claimed employees include marketing. Since this is clearly an important task for a sales-based enterprise, the AAO can only assume that the beneficiary is engaged in performing, rather than merely managing this task. It is noted that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In the instant case, the petitioner's failure to submit sufficient evidence to substantiate its employee list further suggests that the beneficiary's direct involvement in the daily operational tasks is inevitable and probably necessary for the overall success of the petitioning organization. While the AAO will not base its conclusion solely on the size of the petitioner's work force, it will give this factor due consideration in an effort to determine who would perform the non-managerial or non-executive operations of the company. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The fact that the beneficiary apparently has a significant role in the company is well noted. However, the record contains insufficient evidence to enable the AAO to conclude that the beneficiary's days are primarily composed of managerial or executive tasks.

The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve her from performing non-qualifying duties. Nor has the petitioner demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Merely possessing a managerial or executive position title does not establish that the nature of the beneficiary's duties is managerial or executive. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.